**ZAINAL IBRAHIM**

**v.**

**PP**

HIGH COURT MALAYA, SHAH ALAM
BADARIAH SAHAMID JC
[CRIMINAL APPEAL NO: 42-86-2007]
9 SEPTEMBER 2009

***CRIMINAL LAW:*** *Penal Code - Section 376 - Rape - Appeal against conviction and sentence - Finding of prima facie case - Whether erroneously established - Whether there was corroboration of evidence - Whether essential ingredient of absence of consent to sexual intercourse proved beyond reasonable doubt - Whether appellant's conviction a miscarriage of justice*

***EVIDENCE:*** *Corroboration - Rape - Conviction on uncorroborated evidence - Whether evidence 'unusually convincing' - Whether evidence tendered sufficient to establish rape beyond reasonable doubt - Whether appellant's conviction a miscarriage of justice*

The accused/appellant was charged with the offense of rape under s. 376 of the Penal Code and claimed trial to the charge. At the end of the prosecution's case, the trial judge decided that the prosecution had made out a *prima facie* case and called the accused to enter his defence. In her grounds of judgment, the trial judge was satisfied that the prosecution had proven the elements of the offence of rape: the accused/appellant had sexual intercourse with the complainant; the sexual intercourse was without the complainant's consent and there was penetration. The trial judge also found that there was corroboration of the abovementioned elements. The accused/appellant was convicted and sentenced to imprisonment of 17 years and whipping of three strokes. This was the defendant's appeal against conviction and sentence.

**Held (setting aside conviction; acquitting and discharging the appellant):**

**(1)** The occurrence of sexual intercourse with the victim, SP5, was corroborated by DNA analysis of samples of the appellant's blood that drew a match with semen samples recovered from specific items. There was also corroboration of penetration from

A the results of the medical examination of the complainant. Thus, while there was corroboration of the first two ingredients of the offence of rape, there was no corroboration of the third ingredient in the offence of rape *ie*, that there was the absence of consent from SP5. (paras 15 & 16)

B

**(2)** "Corroboration" referred to by the trial judge comprised of the testimonies of the friend, (SP3), the father (SP1) and the mother (SP2) giving evidence of what SP5 had related to them. This did not qualify as corroboration required in law. The judge C had erred in coming to a conclusion that SP5's allegation of rape was corroborated when it was not. Although the trial judge did not refer specifically to s. 157 of the Evidence Act 1950, to support the stand taken above, the abovementioned section appeared to support this position. (paras 17 & 18)

D

**(3)** A conviction on uncorroborated evidence of complainant was only permissible if the evidence was "unusually convincing" and even then the judge must administer a caution to himself/herself that he/she was convicting on the uncorroborated evidence of the complainant. The evidence of SP5 was not in E itself "unusually convincing" as to enable the trial judge to dispense with corroboration. In any event, there was no caution administered by the trial judge as she erroneously believed the evidence of SP5 in respect of the absence of consent was corroborated. (paras 24 & 27)

F

**(4)** The trial judge failed to give due weight to 'surrounding circumstances' that strongly suggested that the sexual intercourse was consensual such as (i) the medical examination of SP5 had found a fresh tear in SP5's hymen and a bruised G knee but no other bruises, scratches or other injuries that suggested resistance to the alleged rape; (ii) SP5 had given evidence that the injury to her right knee was attributable to circumstances not involving the accused; (iii) that SP5 had followed the accused into the bedroom; (iv) that SP5 had made H no attempt to take advantage of opportunities available to her to ask for help. (paras 29 & 30)

**(5)** The essential ingredient of the absence of consent to the sexual intercourse had not been proved beyond reasonable doubt. The I prosecution had not succeeded in proving a *prima facie* case against the accused. The trial judge should have ruled that the

evidence tendered by the prosecution was not sufficient to establish the offence of rape beyond reasonable doubt. In consequence, the appellant should have been acquitted and discharged without his defence being called. His conviction was a miscarriage of justice. (para 35)

**Case(s) referred to:**
*Ah Mee v. PP [1967] 1 LNS 3 FC* ***(refd)***
*Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC* ***(refd)***
*Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC* ***(refd)***
*Chiu Nang Hong v. PP [1964] 1 LNS 24 PC* ***(refd)***
*Dalip Baghwan Singh v. PP [1997] 4 CLJ 645 FC* ***(refd)***
*Din v. PP [1964] 1 LNS 33 FC* ***(refd)***
*Gan Leong Gee & Anor v. PP [1969] 1 LNS 42 HC* ***(refd)***
*Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC* ***(refd)***
*Mohd Ali v. PP [1962] 1 LNS 99 HC* ***(refd)***
*PP v. R Balasubramaniam [1947] 1 LNS 79 HC* ***(refd)***
*PP v. Mardai [1949] 1 LNS 65 HC* ***(refd)***
*R v. Baskerville [1916] 2 KB 658* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 180(4)
Evidence Act 1950, s. 157

**Other source(s) referred to:**
Augustine Paul FCJ, *Evidence, Practice and Procedure*, Malayan Law Journal 2000, p 1038

*For the accused - Renuka; M/s Alvinthiren & Parters*
*For the prosecution - Hana Hadinah DPP*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Badariah Sahamid JC:**

**[1]** The charge against the accused in the Sessions Court in Klang reads as follows:

Bahawa kamu pada 20.08.2003 diantara jam lebih kurang 2.00 pagi didalam bilik rumah tiada nombor XXX telah melakukan rogol dengan seorang perempuan Melayu nama XXX, KP XXX, umur XXX. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 376 Kanun Keseksaan.

**[2]** The accused claimed trial to the charge.

**[3]** The complainant of the alleged rape is SP5. According to the testimony of SP5, after work at about 3.30pm, on 19 August 2003 (the day before the alleged rape), SP5 had gone out for a meal with one named 'Suhaimi' ('Amy' for short) who SP5 had met three days ago. After the meal, Amy brought SP5 to the house of a friend of his. SP5 stayed there till night. It was there at about 8pm that SP5 met the accused for the first time .Thereafter, SP5 had followed the accused, Amy and several of Amy's friends for a meal at a 'warung mamak'. SP5 took a ride with the accused on his motorcycle. On alighting from the accused's motorcycle SP5 had fallen and sustained an injury to her right knee. After the meal, SP5 had elected to ride with Amy on his motorcycle. However, on the way back, SP5 alleged that Amy had made a detour and brought her to a jungle where he had attempted to rape her. SP5 escaped from Amy and later ran into several of Amy's friends. According to SP5, she had pleaded with one of Amy's friends to send her home, but he also threatened to rape her. He instead brought SP5 to a house where she found Amy, Amy's friends as well as the accused there. That was about 10pm. Amy as well as the accused then offered to send SP5 home, but being fearful of Amy, SP5 accepted the accused's offer to send her home.

**[4]** SP5 testified that the accused did try to send her home but had turned back. According to SP5, the accused had explained to SP5 (and it was also the accused's testimony) that it was because they had encountered a police roadblock and the accused dared not proceed as he did not possess a licence to ride a motorcycle. According to the accused, he then contacted his uncle, SD2 to send SP5 home. SD2 testified that SP2 and his girlfriend had met SP5 and the accused (his nephew) that night and they had all attended a karaoke session together. After the karaoke session they proceeded for supper. After supper, at around 11pm, since it was late, SP2 did not send SP5 home. SP5 instead followed the accused to the accused's rented house, where the alleged rape occurred. The following morning, the accused sent SP5 to a bus station where SP5 took a bus to the home of a friend, "Su". Su later brought SP5 back to her home by motorcycle.

**[5]** At the end of the prosecution's case the trial judge decided that the prosecution had made out a *prima facie* case and called the accused to enter his defence. In her grounds of judgment the trial

judge was satisfied that the prosecution had proven the elements of the offence of rape: the defendant had sexual intercourse with the complainant, the sexual intercourse was without the complainant's consent and there was penetration. The trial judge also found there was corroboration of the abovementioned elements, The defendant was convicted and sentenced to imprisonment of 17 years and whipping of three strokes.

**[6]** This is the defendant's appeal against conviction and sentence.

**[7]** After careful examination of the 'rekod rayuan', submissions of both appellant and respondent counsels as well as relevant authorities, I am of the opinion that the prosecution had failed to make out a *prima facie* case of rape against the appellant. It is also my considered opinion that the trial judge had made fundamental errors of law that makes it unsafe to convict the accused.

**[8]** The aforementioned may be summarized thus:

1. Error that there was corroboration of SP5'S evidence when there was none.
2. In the absence of corroboration, conviction can only stand if (i) the uncorroborated evidence is unusually compelling (ii) the Judge administers a caution to herself that the conviction is on uncorroborated evidence. Neither prerequisite was complied with.
3. Failure to give due weight to material evidence that is inconsistent with the absence of consent.
4. Judgment premised on assumptions that are seriously flawed.

**[9]** I will elaborate on the above.

**Error That There Was Corroboration Of SP5's Evidence On The Element Of Consent When There Was None**

**[10]** To prove the offence of rape, the ingredients that the prosecution needs to prove in this case are:

1. The accused had sexual intercourse with SP5;
2. There was penetration;
3. The sexual intercourse was without her consent

**[11]** It has been well established by numerous authorities that in cases of alleged rape, the evidence of the complainant must be corroborated. Thompson LP in *Din v. PP* [1964] 1 LNS 33 FC said:

> If however she complains of having been raped, then both prudence and practice demand that her evidence should be corroborated.

**[12]** In the case of *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523, Augustine Paul J (as he then was) held:

> Although there is no specific rule of law that requires the evidence of a witness to be corroborated, there is a rule of practice stressing the need for corroboration in rape cases.

**[13]** and in the case of *PP v. Mardai* [1949] 1 LNS 65, Spenser Wilkinson J said:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story.

**[14]** In *Ah Mee v. PP* [1967] 1 LNS 3, Ong FJ explained that corroboration in a legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.

**[15]** In this case the occurrence of sexual intercourse with the SP5 was corroborated by DNA analysis of samples of the appellant's blood that drew a match with semen samples recovered from specific items. In addition there was also corroboration of penetration from the results of the medical examination of the complainant on 21 August 2003. According to the examining doctor, SP7, the examination showed evidence of a fresh tear in the hymen at the 9 o'clock position as well as abrasions at fourchette that had occurred in the last 72 hours. SP7 had also testified that,

> kemungkinan koyakkan baru tersebut disebabkan oleh kemasukan penis lelaki di dalam kes ini. (p. 91 of 'Rekod Rayuan')

**[16]** Thus while there was corroboration of the first two ingredients of the offence of rape, I do not find corroboration of the third ingredient in the offence of rape ie, that there was the absence of consent from SP5.

**[17]** On examination of the trial judge's grounds of judgment, I find that the trial judge had committed material and substantive errors of law in this respect. These are as follows: A

1. That the all the elements of the offence of rape abovementioned was "corroborated" by the testimony of SP1, SP2 and SP3. B

> Dalam membuktikan elemen-elemen diatas, (the elements of the offence of rape) mahkamah telah meneliti keterangan SP5 (the complainant) yang mana mahkamah mendapati disokong oleh keterangan SP1, SP2 dan SP3. (p. 227 of 'Rekod Rayuan') C
>
> Su (SP3) juga mengesahkan bahawa SP5 telah menceritakan kepadanya bahawa beliau telah dirogol dan memberitahunya telah dirogol oleh OKT (p. 228 of 'Rekod Rayuan')
>
> Keterangan Su (SP3) ini disokong oleh bapa SP5 (SP1) dan ibunya (SP2) yang mengatakan apabila SP5 pulang kerumah dengan Su (SP3) keadaan SP5 macam takut-takut dan pakaiannya kotor sedikit. SP1 juga mengesahkan bahawa SP5 ada menceritakan bahawa beliau telah dirogol oleh OKT (the accused) D E

It is to be noted that the "corroboration" referred to by the trial Judge comprise of the testimonies of the friend, (SP3), the father (SP1) and the mother (SP2) giving evidence of what SP5 had related to them. This certainly does not qualify as corroboration required in law. F

In the case of *Aziz bin Mohamed Din v. PP* [1996] 5 MLJ 473

One of the issues raised was whether a police report made by SP1 based on what SP2 (the complainant in that case) told him could amount to corroboration. G

It was held that, "the oral evidence of the victim's father and police report made by the victim's father based on what the victim told him cannot be treated as corroboration as they flow from the same source ie, the victim. H

The case also referred to the dicta of Lord Hewart CJ in the case of *R v. Whitehead* [1929] 1 KB 99 that:

> In order that evidence may amount to corroboration it must be extraneous to witness who is to be corroborated. A girl cannot corroborate herself; otherwise it is only necessary for her to repeat her story 25 times in order to get corroboration of it. I

**[18]** Thus it is clear that the evidence of SP1. SP2 and SP3 cannot qualify as corroboration. In this case the judge had erred in coming to a conclusion that SP5's allegation of rape was corroborated when it was not. Although the trial judge did not refer specifically to s. 157 of the Evidence Act 1950, to support the stand taken above, the abovementioned section appears to support this position. The section states as follows:

> 157. Former statements of witness may be proved to corroborate later testimony as to same fact.
>
> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

**[19]** Augustine Paul FCJ, in his book, "*Evidence, Practice and Procedure*", Malayan Law Journal 2000 at p. 1038 refers to two schools of thought in this respect. One school of thought holds that a witness can corroborate herself; the other school of thought however asserts that because corroboration must emanate from an independent source, a witness cannot corroborate herself. After studying the authorities, his Lordship concluded:

> It can therefore be taken as settled law that a previous statement rendered admissible by this section (section 157) cannot constitute evidence of corroboration as popularly understood.

**[20]** His Lordship made reference to numerous cases which have laid down that corroboration in the strict sense is that understood by authorities such as *R v. Baskerville* [1916] 2 KB 658, which essentially laid down that corroboration means corroboration by independent evidence, from an extraneous source. In the case of *Mohd Ali v. PP* [1962] 1 LNS 99, Ong J (as he then was) elaborated on the difference between corroboration abovementioned and corroboration according to Section 157 in the following terms:

> Admissibility of a previous statement under that section (section 157 of Evidence Ordinance, 1950) must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R v. Baskerville*. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' as it appears in section 157, which rests on the principle that consistency

between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is.

**[21]** Other authorities referred to in support of the above include *Chiu Nang Hong v. PP* [1964] 1 LNS 24 PC, *Ah Mee v. PP* [1967] 1 LNS 3 FC; *Karthiyayani & Anor v. Lee Leong Sin & Ano*r [1974] 1 LNS 61 FC.

**[22]** Thus it is clear that, contrary to the finding of the trial judge, the vital element of the absence of consent of SP5 had not been corroborated.

**[23]** In the absence of corroboration, conviction can only stand if:

(i) the uncorroborated evidence is unusually compelling;

(ii) the judge administers a caution to himself/herself that the conviction is on uncorroborated evidence.

**[24]** A conviction on uncorroborated evidence of complainant is only permissible if the evidence is "unusually convincing". *PP v. Mardai* [1949] 1 LNS 65 and even then, the judge must administer a caution to himself/herself that he/she is convicting on the uncorroborated evidence of the complainant. *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523; *Gan Leong Gee & Anor v. PP* [1969] 1 LNS 42 HC.

**[25]** I am of the opinion that the evidence of the SP5 was not in itself "unusually convincing" as to enable the trial judge to dispense with corroboration. In considering the SP5's testimony, questions arise with respect to SP5's credibility and rationality. The following are examples.

(i) SP5 had admitted she had lied to her father that she finished work at 9pm instead of 3.30pm on that day in order that she could go out with Amy, a man she had just met three days ago. (p. 61-63, 129 of Rekod Rayuan)

(ii) SP5 had claimed she had never had sex before the alleged rape while medical examination showed two previous tears that demonstrate a possibility of her previous sexual history. (pp. 89, 93 of Rekod Rayuan)

A (iii) SP5 gave conflicting testimonies in respect of the number of men who had attempted to rape her on the day she met the appellant:

five men, (p. 120 of Rekod Rayuan) seven men, (p. 179 of Rekod Rayuan) and ten men (p. 66 of Rekod Rayuan)

B

(iv) SP5 had testified she had escaped attempted rape from Amy, (whom she only knew three days ago) and his friends, but had immediately followed the appellant, whom she had only met on the day, to at least two meals and a karaoke session before following the appellant home. (pp. 51, 52, 53 of Rekod Rayuan)

C

**[26]** The question to ask is this: Is the SP5's testimony so unusually convincing that it can stand independent of corroboration? I think not.

D

**[27]** In any event there was no caution administered by the trial judge as she erroneously believed the evidence of the SP5 in respect of the absence of consent was corroborated.

E

**Failure To Give Due Weight To Material Evidence That Is Inconsistent With The Absence Of Consent**

**[28]** While the trial judge had rightly cited Justice Low Hop Bing in the case of *PP v. Shamsuddin* [1981] 2 MLJ that "consent is a mental element which by its nature cannot be proved by direct evidence ... therefore it is essential to look at the surrounding circumstances ... " the trial judge had failed to give due weight to "surrounding circumstances" that strongly suggest that the sexual intercourse was consensual. They include the following:

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(i) The medical examination of SP5 conducted on 21 August 2003 had found a fresh tear (within the last 72 hrs.) in SP5's hymen and a bruised knee but no other bruises, scratches or other injuries that suggest resistance to the alleged rape.

H

**[29]** In the evidence of SP6 the doctor who conducted the medical examination:

Saya ada membuat pemeriksaan physical pada mangsa yang terdapat lebam pada lutut kanan berukur 1.5 cm. dan 1.5 cm lain-lain kecederaan tidak ada. (p. 89 of; Rekod Rayuan)

I

**[30]** This is supported by the testimony of SP2 in answer to the question:

> Semasa XXX pulang kerumah adakah keadaan kotor seperti dipukul dan sebagainya?
>
> Kotor atau kesan pukul tiada cuma kesan dia jatuh sahaja

It is to be noted that the SP5 herself had given evidence that the injury to her right knee was attributable to circumstances not involving the accused.

> Masa nak pergi makan, saya naik motor dengan OKT dan tiba-tiba saya jatuh dari motor. Saya ada alami kecederaan dilutut sebelah kanan (p. 49 of 'Rekod Rayuan')

(ii) There was also testimony from the SP5 herself that raises doubts on the absence of consent from SP5.

> During cross examination, SP5 had testified:
>
> Din mengajak saya tidur didalam bilek. Saya ikut Din kedalam bilik. Saya masuk dulu kedalam bilik. (p. 53 of 'Rekod Rayuan')
>
> Q: Kamu tidak beritahu Din untuk tidur bilik sebelah?
>
> A: Tidak (p. 72 of 'Rekod Rayuan')

(iii) Although there were opportunities available to SP5 to ask for help SP5 had made no attempt to take advantage of these opportunities.

> (i) SP5 was in possession of a hand phone at the material time, but never attempted to use it to ask for help. (p. 64, 130 of Rekod Rayuan).
>
> (ii) the alleged rape occurred in a room in a single storey terrace house, with adjoining houses, (p. 45 of Rekod Rayuan) but SP5 never shouted for help or attempted to get any assistance.

This is confirmed by SP5 in the cross examination. (p. 73 of Rekod Rayuan)

> Q: Setuju dengan saya pada keseluruhan waktu yang kamu katakan kamu tidak jerit tolong
>
> A: Setuju

A **Judgment Premised On Assumptions That Are Seriously Flawed**

**[31]** In the trial judge's grounds of judgment (p. 240 of Rekod Rayuan) the trial judge had made the following remarks:

> B Tiada sebab untuk SP5 mereka-reka cerita atau menganiaya OKT yang baru dikenalinya pada hari kejadian. Dalam keterangan OKT juga mengatakan bahawa beliau yang telah menanggalkan seluar dan seluar dalam SP5. Jika hubungan seks ini adalah dengan kerelaan SP5 sudah semestinya SP5 akan menanggalkan sendiri semua pakaiannya sebelum hubungan seks ini berlaku. Ini menunjukkan C ketidak relaan SP5 apabila dirogol oleh OKT. (p. 240 of Rekod Rayuan)

**[32]** The trial judge had made two assumptions that are seriously flawed:

D (i) that SP5 could not have fabricated her alleged rape against the appellant whom she had just met on the same day;

(ii) that the appellant's conduct in undressing SP5 is evidence of a lack of consent from SP5.

E **The Prosecution Has Not Made Out A *Prima Facie* Case Against The Accused**

**[33]** According to s. 180(4) of the Criminal Procedure Code "... a *prima facie* case is made out against the accused where the F prosecution has adduced credible evidence proving each ingredient of the offence which unrebutted or unexplained would warrant a conviction."

**[34]** This is supported by the Federal Court decisions of *Dalip* G *Baghwan Singh v. PP* [1997] 4 CLJ 645 and *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597. In the latter case the Federal Court stated:

> The standard of proof required on the prosecution at all stages of the hearing is one of beyond reasonable doubt. If the prosecution has not established the ingredients of the offence beyond reasonable H doubt, then the accused must be acquitted forthwith. Only if each ingredient has been established beyond reasonable doubt can the accused be called to enter his defence.

**[35]** I have carefully examined the Rekod Rayuan and as I demonstrated above, find that the essential ingredient of the absence of consent to the sexual intercourse has not been proved beyond reasonable doubt. I am of the opinion that the prosecution

had not succeeded in proving a *prima facie* case against the accused. (*PP v. R Balasubramaniam* [1947] 1 LNS 79 HC) The trial judge should have ruled that the evidence tendered by the prosecution was not sufficient to establish the offence of rape beyond reasonable doubt. In consequence thereof the appellant should have been acquitted and discharged without his defence being called. His conviction is a miscarriage of justice. I therefore set aside his conviction and acquit and discharge the appellant.

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